

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 589

**COMMISSIONER OF INTERNAL REVENUE
PETITIONER**

vs.

WILLIAM D. DISSTON

**WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT**

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1a In the Tax Court of the United States

Docket entries

(Docket No. 109985)

- Feb. 19, 1942—Petition received and filed. Taxpayer notified.
Fee not paid.
- Feb. 19, 1942—Request for Circuit hearing in Philadelphia, Pa.
filed by taxpayer. 2-24-42 copy served:
- Feb. 23, 1942—Copy of petition served on General Counsel.
- Feb. 23, 1942—Fee paid—check.
- Apr. 13, 1942—Answer filed by General Counsel.
- Apr. 16, 1942—Copy of answer served on taxpayer, (Philadelphia, Pa.).
- July 25, 1942—Hearing set September 14, 1942—Philadelphia, Pa.
- Aug. 20, 1942—Notice of appearance of Harold Evans as counsel for taxpayer filed.
- Aug. 20, 1942—Notice to send all notices to Harold Evans filed by Cuthbert H. Latta, Jr.
- Sept. 14, 1942—Hearing had before Mr. Hill, on the merits. Submitted. Motion of petitioner to consolidate no objection by respondent, granted. Stipulation of facts and supp. stipulation of facts filed at hearing. Briefs due Oct. 14, 1942, reply briefs due Oct. 29, 1942.
- Sept. 30, 1942—Transcript of hearing 9-14-42 filed.
- Oct. 14, 1942—Brief filed by taxpayer.
- Oct. 16, 1942—Motion for leave to file the attached brief, brief lodged filed by General Counsel. 10-16-42 granted and served 10-17-42.

Docket Entries (No. 109985)

- 2a Oct. 17, 1942—Copy of brief served on General Counsel.
- Feb. 4, 1943—Memorandum opinion rendered, Hill, Judge. Decision will be entered under Rule 50. 2-5-43 copy served.
- Feb. 26, 1943—Computation of deficiency filed by General Counsel.
- Mar. 5, 1943—Hearing set March 24, 1943 on settlement.
- Mar. 12, 1943—Consent to settlement filed by taxpayer.
- Mar. 15, 1943—Decision entered, Sam B. Hill, Judge, Div. 2.
- June 8, 1943—Petition for review by U. S. Circuit Court of Appeals, 3rd Circuit, with assignments of error filed by taxpayer.

June 8, 1943—Notice of filing petition for review sent to J. P. Wenchel, filed.

June 9, 1943—Proof of service of filing petition for review (J. P. Wenchel), filed.

July 1, 1943—Stipulation as to record filed.

3a

In the Tax Court of the United States

Petition

Filed February 19, 1942

(Docket No. 109085)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-1068-37) dated November 21, 1941, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual residing at 8840 Norwood Avenue, Philadelphia, Pennsylvania. The gift tax return for the period here involved was filed with the Collector of Internal Revenue for the First District of Pennsylvania.

2. The notice of deficiency (a copy of which, marked exhibit A, is attached hereto) was mailed to the petitioner on or about November 21, 1941.

3. The tax in controversy is gift tax for the calendar year 1937, the deficiency which has been asserted with respect thereto is in the amount of \$644.48. The entire deficiency is in dispute.

4. The determination of tax as set forth in said notice of deficiency is based upon the following errors:

(a) In computing the amount of net gifts made by the petitioner during the year 1937, the Commissioner of Internal Revenue erred in disallowing an exclusion of \$5,000 on account of a gift made by the petitioner to his son, William L. Disston, in disallowing an exclusion of \$5,000 on account of a gift made by the petitioner to his daughter, Rachel Elizabeth Disston, and in disallowing an exclusion of \$5,000 on account of a gift made by the petitioner to his daughter, Patricia Disston.

4a (b) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the proceeding subparagraph (a) were gifts of future interests.

(c) The Commissioner of Internal Revenue erred in his computation of the tax for the year 1937 in that, despite the fact that the statute of limitations precluded any adjustment in the computation of net gifts made by the petitioner during the year 1936, the

Commissioner of Internal Revenue made adjustments in the computation of such net gifts for the year 1936 and thereby increased the rate of tax payable with respect to any net gifts which may have been made by the petitioner during the year 1937.

(d) Even if the computation of net gifts made by the petitioner during the year 1936 were subject to adjustment at this time by the Commissioner of Internal Revenue, nevertheless the Commissioner of Internal Revenue erred in adjusting such computation by allowing an exclusion of only \$470, instead of \$5,000, on account of gifts made by the petitioner during that year to his son, William L. Disston, by disallowing an exclusion of \$5,000 on account of a gift made by the petitioner during that year to his daughter, Rachel Elizabeth Disston, and by disallowing an exclusion of \$5,000 on account of a gift made by the petitioner during that year to his daughter, Patricia Disston.

(e) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (d) with respect to which no exclusion was allowed were gifts of future interests.

(f) The Commissioner of Internal Revenue erred in finding a deficiency in gift tax for the year 1937 in the amount of \$644.48.

(g) The Commissioner of Internal Revenue erred in failing to find that there was no deficiency in gift tax for the year 1937.

5a 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) By deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company et al., trustees (a copy of which deed, marked exhibit B, is attached hereto), the petitioner created a trust for the benefit of each of his five children, namely: Dorothea D. James, Delborah Disston, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston.

(b) On January 1, 1938, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston had not attained the age of twenty-one years.

(c) On or about March 8, 1937, the petitioner filed a gift tax return for the year 1936.

(d) Subsequently said gift tax return for the year 1936 was audited and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating \$71,952.49:

To Deborah Disston	\$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936	64,975.83

The Commissioner further determined that the petitioner was entitled to an exclusion of \$5,000 on account of the gift to each of his said five children and also on account of the gift to his wife, and hence that the petitioner's net gifts for the year 1936, after deducting an exemption of \$40,000, amounted to \$1,952.49 on which tax was assessed and paid.

(e) On March 21, 1937, the petitioner transferred to the trustees under said deed dated December 17, 1936, 500 shares of the capital stock of Henry Disston & Sons having an aggregate value of \$25,000, and upon receipt thereof the trustees allocated 100 shares, having a value of \$5,000, to the trust for each of the petitioner's said five children.

Wherefore the petitioner prays that this Board may hear the proceeding, may find that the Commissioner of Internal Revenue erred in asserting a deficiency and may find that there is no deficiency.

(S) WILLIAM D. DISSTON,
William D. Disston,

8840 Norwood Avenue, Philadelphia, Penna.,
Petitioner.

(S) CUTHBERT H. LATTI, JR.,
Cuthbert H. Latta, Jr.,

1000 Provident Trust Building,
Philadelphia, Penna.,
Counsel for Petitioner.

[Duly sworn to by William D. Disston; jurat omitted in printing.]

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Exhibit A to petition

TREASURY DEPARTMENT

WASHINGTON

Office of Commissioner of Internal Revenue

NOVEMBER 21, 1941.

Address Reply to Commissioner of Internal Revenue and Refer to MT-ET-GT-1068-37-1st Pennsylvania, Donor—William D. Disston.

Mr. WILLIAM D. DISSTON,

8840 Norwood Avenue, Philadelphia, Pennsylvania.

SIR: You are advised that the determination of your gift tax liability for the calendar year 1937 discloses a deficiency of \$644.48 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (s) D. S. BLISS,
D. S. Bliss,
Deputy Commissioner.

Incl.—9543.

STATEMENT

Calendar Year 1937

The deficiency is computed as follows:

	Returned	Determined
Total gifts, 1937, other than charitable, public, and similar gifts.....	\$25,000.00	\$25,000.00
Less exclusions.....	25,000.00	10,000.00
Amount of gifts included.....	0.00	15,000.00
Less specific exemption.....	0.00	0.00
Net gifts, 1937.....	0.00	15,000.00
Net gifts for preceding years.....	0.00	16,482.49
Total net gifts.....	0.00	31,482.49
Tax on total net gifts.....	0.00	988.95
Tax on net gifts for preceding years.....	0.00	344.47
Tax on net gifts, 1937.....	0.00	644.48
Tax shown on return.....		0.00
Deficiency, 1937.....		644.48

¹ Net gifts for preceding years are in accordance with the following adjustments made in connection with your 1936 return.

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COMMISSIONER VS. WILLIAM D. DISSTON

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The deficiency results from the following adjustments:

SCHEDULE A

Exclusions	Determined	Returned
To balance (amount of increase)	\$10,000.00	\$20,000.00
	10,000.00	

No exclusions are allowed with respect to the gifts to the trust dated December 17, 1936, for the benefit of William L. Disston, Rachel Elizabeth Disston and Patricia Disston since the trust provides that the income payable to these beneficiaries is to be accumulated until they attain the age of twenty-one years. The trust also provides that the trustees shall apply such income as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. Since it may not be necessary for the trustees to use any part of the income and since the minor beneficiaries do not receive the absolute unrestricted right to the immediate use and enjoyment of the income and/or principal of the trust estate, the transfers in question are considered to be gifts of future interests against which no exclusions are allowable.

STATEMENT—1936

The adjustments are set forth as follows:

Total gifts, 1936, other than charitable, public and similar gifts	Prior Determination	Rede-termination
Less exclusions	71,932.49	71,932.49
	30,000.00	15,470.00
Amount of gifts included	41,932.49	56,462.49
Less specific exemption	40,000.00	40,000.00
Net gifts, 1936	1,932.49	16,462.49

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The increase results from the following adjustments:

SCHEDULE A

Exclusions	Rede-termination	Prior Determination
To balance (amount of increase)	15,470.00	30,000.00
	14,530.00	

No exclusions are allowed with respect to the gifts in trust for the benefit of William L. Disston, Rachel Elizabeth Disston, and Patricia Disston since such gifts are considered to be gifts of future interests against which no exclusions are allowable. See explanation relative to disallowance of exclusions in connection with your 1937 return.

The exclusions allowable are set forth as follows:

William L. Disston.....	\$470.00
Dorothea P. Disston.....	5,000.00
Dorothea D. James.....	5,000.00
Deborah Disston.....	5,000.00
Total.....	15,470.00

Exhibit B to Petition in No. 109985, Deed of Trust dated December 17, 1936, is the same as Exhibit 1 to Stipulation of Facts, printed at pp. 29a-41a infra.

11a In the Tax Court of the United States

Answer

Filed April 13, 1942

(Docket No. 109985)

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegation of paragraph 1 of the petition.
2. Admits the allegations of paragraph 2 of the petition.
3. Admits the allegations of paragraph 3 of the petition.
4. (a) to (g) Denies the allegations of paragraphs 4 (a) to (g), inclusive, of the petition.
5. (a) Admits that by deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company, et al., trustees, the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston, William L. Disston, Rachel Elizabeth Disston and Patricia Disston; denies the remaining allegations of paragraph 5 (a) of the petition.
5. (b) Admits the allegations of paragraph 5 (b) of the petition.
- (c) Admits that the petitioner filed a gift tax return for the year 1936; denies the remaining allegations of paragraph 5 (c), of the petition.
- (d) Admits that said gift tax return for the year 1936 was audited and after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating \$71,952.49:

12a To Deborah Disston.....	\$488.33
To William L. Disston.....	488.33
To Dorothea P. Disston (the petitioner's wife).....	6,000.00
To the trustees under said deed of trust dated December 17, 1936.....	64,975.83

Further admits that the petitioner was allowed an exclusion of \$5,000.00 on account of the gift to each of his said five children and also on account of the gift to his wife; and hence that the petitioner's net gifts for the year 1936 after deducting an exemption of \$40,000.00 was computed to be \$1,952.49 on which tax was assessed and paid; denies the remaining allegations of paragraph 5 (d) of the petition.

(e) Admits the allegations of paragraph 5 (e) of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

HARTFORD ALLEN,
Division Counsel,

HARRY L. BROWN,
Special Attorney,
Bureau of Internal Revenue.

13a

In the Tax Court of the United States

Docket entries

(Docket No. 110630)

- Apr. 18, 1942—Petition received and filed. Taxpayer notified.
Fee paid.
- Apr. 18, 1942—Request for Circuit hearing in Philadelphia, Pa.
filed by taxpayer. 4-2-42 copy served.
- Apr. 20, 1942—Copy of petition served on General Counsel.
- June 10, 1942—Answer filed by General Counsel.
- June 13, 1942—Copy of answer served on taxpayer (Philadelphia,
Pa.).
- July 25, 1942—Hearing set September 14, 1942 in Philadelphia,
Pa.
- Aug. 20, 1942—Notice of appearance of Harold Evans as counsel
for taxpayer filed.
- Aug. 20, 1942—Notice to send all notices to Harold Evans filed
by Cuthbert H. Latta, Jr.
- Sept. 14, 1942—Hearing had before Mr. Hill on the merits. Sub-
mitted. Motion of petitioner to consolidate with
Dkt. 109985, granted. Stipulation of facts filed,
supplemental stipulation of facts filed. Briefs
due Oct. 14, 1942, reply 15 days Oct. 29, 1942.
- Sept. 30, 1942—Transcript of hearing September 14, 1942 filed.
- Oct. 14, 1942—Brief filed by taxpayer.

- Oct. 16, 1942—Motion for leave to file the attached brief, brief lodged filed by General Counsel. 10-16-42 granted and served 10-19-42.
- Oct. 17, 1942—Copy of brief served on General Counsel.
- 14a Feb. 4, 1943—Memorandum opinion rendered, Hill, Judge, #2. Decision will be entered under Rule 50. 2-5-43 copy served.
- Feb. 26, 1943—Computation filed by General Counsel.
- Mar. 3, 1943—Hearing set 3-24-43 on settlement.
- Mar. 12, 1943—Consent to settlement filed by taxpayer.
- Mar. 15, 1943—Decision entered, Sam B. Hill, Judge, Div. 2.
- June 8, 1943—Petition for review by U. S. Circuit Court of Appeals, 3rd Circuit, with assignments of error filed by taxpayer.
- June 8, 1943—Notice of filing petition for review sent to J. P. Wenchel filed.
- June 9, 1943—Proof of service of filing petition for review sent to J. P. Wenchel filed.
- July 1, 1943—Stipulation as to record filed.

15a

In the Tax Court of the United States

Petition

Filed April 18, 1942

(Docket No. 110630)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (SN-GT-1) dated February 19, 1942, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual residing at 8840 Norwood Avenue, Philadelphia, Pennsylvania. The gift tax return for the period here involved was filed with the Collector of Internal Revenue for the First District of Pennsylvania.

2. The notice of deficiency (a copy of which, marked Exhibit A, is attached hereto) was mailed to the petitioner on or about February 19, 1942.

3. The tax in controversy is gift tax for the calendar year 1938, the deficiency which has been asserted with respect thereto is in the amount of \$1,430.08. The entire deficiency is in dispute.

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) In computing the amount of net gifts made by the petitioner during the year 1938, the Commissioner of Internal Revenue erred

in disallowing an exclusion of \$5,000 on account of a gift made by the petitioner to his daughter, Rachel Elizabeth Disston, and in disallowing an exclusion of \$5,000 on account of a gift made by the petitioner to his daughter, Patricia Disston.

(b) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (a) were gifts of future interests.

(c) The Commissioner of Internal Revenue erred in his computation of the tax for the year 1938 in that, despite the fact that the statute of limitations precluded any adjustment in the computation of net gifts made by the petitioner during the year 1936, the Commissioner of Internal Revenue made adjustments in the computation of such net gifts for the year 1936 and thereby increased the rate of tax payable with respect to any net gifts which may have been made by the petitioner during the year 1938.

(d) Even if the computation of net gifts made by the petitioner during the year 1936 were subject to adjustment at this time by the Commissioner of Internal Revenue, nevertheless the Commissioner of Internal Revenue erred in adjusting such computation by allowing an exclusion of only \$470, instead of \$5,000, on account of gifts made by the petitioner during that year to his son, William L. Disston, by disallowing an exclusion of \$5,000, on account of a gift made by the petitioner during that year to his daughter, Rachel Elizabeth Disston, and by disallowing an exclusion of \$5,000 on account of a gift made by the petitioner during that year to his daughter, Patricia Disston.

(e) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (d) with respect to which no exclusion was allowed were gifts of future interests.

(f) The Commissioner of Internal Revenue erred in computing the amount of net gifts made by the petitioner for prior years by disallowing an exclusion of \$5,000 on account of a gift made by the petitioner during the year 1937 to his son, William L. Disston; by disallowing an exclusion of \$5,000 on account of a gift made by the petitioner during the year 1937 to his daughter, Rachel Elizabeth Disston; and by disallowing an exclusion of \$5,000 on account of a gift made by the petitioner during the year 1937 to his daughter, Patricia Disston.

17a (g) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (f) with respect to which no exclusion was allowed were gifts of future interests.

(h) The Commissioner of Internal Revenue erred in finding a deficiency in gift tax for the year 1938 in the amount of \$1,430.09.

(i) The Commissioner of Internal Revenue erred in failing to find that there was no deficiency in gift tax for the year 1938.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) By deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company et al., trustee (a copy of which deed, marked Exhibit "B", is attached hereto), the petitioner created a trust for the benefit of his five children, namely: Dorothea D. James, Deborah Disston, William L. Disston, Rachel Elizabeth Disston and Patricia Disston.

(b) On January 1, 1938, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston had not attained the age of twenty-one years.

(c) On or about March 8, 1937, the petitioner filed a gift tax return for the year 1936.

(d) Subsequently said gift tax return for the year 1936 was audited and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating \$71,952.49:

To Deborah Disston	\$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
18a To the trustees under said deed of trust dated December 17, 1936	64,975.83

The Commissioner further determined that the petitioner was entitled to an exclusion of \$5,000 on account of the gift to each of his said five children and also on account of the gift to his wife, and hence that the petitioner's net gifts for the year 1936, after deducting an exemption of \$40,000 amounted to \$1,952.49 on which tax was assessed and paid.

(e) On March 21, 1937, the petitioner transferred to the trustees under said deed dated December 17, 1936, 500 shares of the capital stock of Henry Disston & Sons having an aggregate value of \$25,000, and upon receipt thereof the trustees allocated 100 shares, having a value of \$5,000, to the trust for each of the petitioner's said five children.

(f) By deed dated December 9, 1938, from the petitioner to Dorothea D. James, et al., trustees (a copy of which deed marked Exhibit C is attached hereto), the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston Swartz, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston.

(g) By said deed of trust dated December 9, 1938, the petitioner conveyed to said trustees two tracts of land (a full description of said tracts is contained in Schedule A of the deed of trust marked Exhibit C which is attached hereto) valued at \$38,581.54.

(h) On January 1, 1939, Rachel Elizabeth Disston and Patricia Disston had not attained the age of twenty-one years.

Wherefore the petitioner prays that this Board may hear
19a the proceedings, may find that the Commissioner of Internal Revenue erred in asserting a deficiency and may find that there is no deficiency.

WILLIAM D. DISSTON,
8840 Norwood Avenue, Philadelphia, Penna.,
Petitioner.

CUTHBERT H. LATTA, Jr.,
1000 Provident Trust Building, Philadelphia, Penna.,
Counsel for Petitioner.

[Duly sworn to by William D. Disston; jurat omitted in printing.]

20a

Exhibit A to petition

SN-GT-1

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PHILADELPHIA, PA., February 19, 1942.

Mr. WILLIAM D. DISSTON,
8840 Norwood Avenue, Philadelphia, Pennsylvania.

SIR: You are advised that the determination of your gift tax liability for the calendar year 1938 discloses a deficiency of \$1,430.08, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By R. I. MILES,
Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
Form 272M.
BMN/pk.

21a

STATEMENT

William D. Disston, Donor, 8840 Norwood Avenue, Philadelphia
Pennsylvania

Tax Liability for Calendar Year 1938

	Liability	Assessed	Deficiency
Gift Tax	\$1,716.81	\$286.73	\$1,430.08

In making this determination of your gift tax liability, careful consideration has been given to the report of examination dated January 8, 1942.

Adjustments to Net Gifts

Schedule A of return:

	Returned	Determined
Total gifts, other than charitable, public, and similar gifts, 1938	\$41,761.95	\$41,504.62
Less exclusions	27,923.08	17,923.08
Included amount of gifts	13,838.87	23,581.54
Net gifts	13,838.87	23,581.54

Explanation of Adjustments

Schedule A of return:

Item 1—94 acres farm land	38,620.00	38,362.67
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This item had been included in the amount appraised as shown in the records.

Exclusions	27,923.08	17,923.08
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The two exclusions claimed in connection with gifts in trust for Rachel Elizabeth Disston and Patricia Disston have been disallowed.

It has been held that these are gifts of future interest, against which no exclusions are allowable.

22a

Computation of Gift Tax

	Returned	Determined
Net gifts for 1938	\$13,838.87	\$23,581.54
Total net gifts for preceding years	None	31,482.49
Total net gifts	13,838.87	55,064.03
Tax on total net gifts	265.17	2,705.76
Tax on net gifts for preceding years	None	988.95
Tax on net gifts for 1938	265.17	1,716.81

Tax assessed:

Original, March 1939 list, Page
202, line 9..... 265.17
Additional, 11/39 list, Page 290,
line 0..... 21.56

286.73

Deficiency of gift tax, 1938..... 1,480.08

Explanation of Adjustments to Total Net Gifts for Prior Years

Total net gifts for prior years:

Calendar year 1936.....	None	16,482.40
Calendar year 1937.....	None	15,000.00
Total.....		31,482.40

Adjustments to Net Gifts for 1936

Total gifts.....	71,802.50	71,802.40
Less exclusions.....	30,000.00	15,470.00
Included amount of gifts.....	41,802.50	56,482.40
Less: Specific exemption.....	40,000.00	40,000.00
Net gifts, 1936.....	1,802.50	16,482.40

Adjustments to Net Gifts for 1937

Total gifts.....	25,000.00	25,000.00
Less exclusions.....	25,000.00	10,000.00
Included amount of gifts.....	None	15,000.00

23a The three exclusions of \$5,000.00 each claimed for gifts in trust in the above-mentioned years have been disallowed. It has been held that they represent gifts of future interest against which no exclusions are allowable.

Exhibit B to Petition in No. 110630, Deed of Trust dated December 17, 1936, is the same as Exhibit 1 to Stipulation of Facts, printed at pp. 29a-41a, *infra*.

Exhibit C to Petition in No. 110630, Deed of Trust dated December 9, 1938, is the same as Exhibit 2 to Stipulation of Facts, printed at pp. 42a-55a, *infra*.

24a

In the Tax Court of the United States

Answer

Filed June 10, 1942

(Docket No. 110630)

Now comes the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue,

and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.
2. Admits the allegations of paragraph 2 of the petition.
3. Admits the allegations of paragraph 3 of the petition.
4. (a) to (i) Denies the allegations of paragraph 4 (a) to (i), inclusive, of the petition.
5. (a) Admits that by deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company, et al., trustees, the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston; denies the remaining allegations of paragraph 5 (a) of the petition.
- (b) Admits the allegations of paragraph 5 (b) of the petition.
- (c) Admits that the petitioner filed a gift tax return for the year 1936; denies the remaining allegations of paragraph 5 (c) of the petition.
5. (d) Admits that said gift tax return for the year 1936 was audited, and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating \$71,952.49:

To Deborah Disston	\$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936.	64,975.83

Further admits that the petitioner was allowed an exclusion of \$5,000.00 on account of the gift to each of his said five children and also on account of the gift to his wife, and, hence, that the petitioner's net gifts for the year 1936, after deducting an exemption of \$40,000.00, was computed to be \$1,952.49, on which tax was assessed and paid; denies the remaining allegations of paragraph 5 (d) of the petition.

- (e) Admits the allegations of paragraph 5 (e) of the petition.
- (f) Admits that by deed dated December 9, 1938, from the petitioner to Dorothea D. James, et al., trustees, the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston Swartz, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston; denies the remaining allegations of paragraph 5 (f) of the petition.
- (g) Admits that by said deed of trust dated December 9, 1938, the petitioner conveyed to said trustees two tracts of land valued at \$38,581.54; denies the remaining allegations of paragraph 5 (g) of the petition.

5. (h) Admits the allegations of paragraph 5 (h) of the petition.

26a 6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) J. P. WENGEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

HARTFORD, ALLEN,
Division Counsel,

HARRY L. BROWN,
Special Attorney,
Bureau of Internal Revenue.

27a In the Tax Court of the United States

Stipulation of facts

(Docket Nos. 110630 and 109985; Filed at hearing September 14, 1942)

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that for the purposes of the above-entitled proceedings, the Board may accept the following statements as true and include them in its Findings of Fact. It is further agreed that neither party hereto shall be precluded from introducing at the hearing in this matter any further facts not inconsistent with those stated herein.

1. William D. Disston, the petitioner herein, is an individual residing at 8840 Norwood Avenue, Philadelphia, Pennsylvania. The gift tax returns for the periods here involved were filed with the Collector of Internal Revenue for the First District of Pennsylvania.

2. By deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company et al., trustees (a copy of which Deed is in evidence as Exhibit 1) the petitioner created a trust for the benefit of each of his five children, namely: Dorothea D. James, Deborah Disston, William L. Disston, Rachael Elizabeth Disston, and Patricia Disston.

3. Petitioner filed a gift tax return for the year 1936. Subsequently said gift tax return for the year 1936 was audited by the Commissioner and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936

the petitioner had made the following gifts aggregating \$71,952.49:

To Deborah Disston	\$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936	64,975.83

28a The Commissioner allowed the petitioner an exclusion of \$5,000.00 on account of the gift to each of his said five children and also on account of the gift to his wife, and hence the petitioner's net gifts for the year 1936, after deducting an exemption of \$40,000.00 were computed to be \$1,952.49 on which tax was assessed and paid.

4. On March 21, 1937, the petitioner transferred to the trustees under said deed dated December 17, 1936, 500 shares of the capital stock of Henry Disston & Sons having an aggregate value of \$25,000.00, and upon receipt thereof the trustees allocated 100 shares, having a value of \$5,000.00 to the trust for each of the petitioner's said five children.

5. By deed dated December 9, 1938, from the petitioner to Dorothea D. James, et al, trustees (a copy of which deed is in evidence as Exhibit 2), the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston Swartz, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston.

6. By said deed of trust dated December 9, 1938, the petitioner conveyed to said trustees two tracts of land valued at \$38,581.54.

7. The respective dates of birth of petitioner's five children are as follows:

Dorothea D. James	May 2, 1912.
Deborah Disston Swartz	April 21, 1915.
William L. Disston	April 12, 1917.
Rachael Elizabeth Disston	May 2, 1919.
Patricia Disston	February 23, 1924.

HAROLD EVANS,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

29a *Exhibit 1 to stipulation of facts*

This deed of trust made this 17th day of December 1936 between William Dunlop Disston, of the City and County of Philadelphia and State of Pennsylvania, hereinafter called the Settlor, of the one part, and Liberty Title and Trust Company, Dorothea D. James, and Deborah Disston, and such other additional trustees as

may qualify in accordance with the terms hereof, hereinafter called the Trustees of the other part, witnesseth that:

First. Creation of Trust: In consideration of One Dollar (\$1.00) paid by Trustees to Settlor at the execution hereof, the receipt of which is hereby acknowledged, and for the purpose of settling the property herein mentioned upon the trusts herein declared, Settlor hereby grants, assigns, and sets over unto Trustees and their successors All That Certain property more particularly described in Schedule "A" hereto attached and made a part hereof, together with all other property which may at any time be added to the principal of this trust, to be held by Trustees upon the following trusts:

Second. Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest, and reinvest the principal of said shares in accordance with the powers hereinafter granted, In Trust, Nevertheless, as follows:

1. As to one of said equal shares of principal, to pay over to Dorothea D. James in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof 30a as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

2. As to the second of said equal shares of principal, to pay over to Deborah Disston in not less than quarterly instalments, the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five

years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided,

31a however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income; and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants (including children, if any, legally adopted by him or his descendants) in such amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of his said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said son shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said son to appoint to his wife during her lifetime or for any shorter period such portion of the annual net income from his share of principal as he may elect, not to exceed, however, one-half of such income.

32a 4. As to the fourth of said equal shares of principal to accumulate the net income therefrom for the benefit of Rachel Elizabeth Disston until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and

thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts, and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

5. As to the fifth of said equal shares of principal, to accumulate the net income therefrom for the benefit of Patricia Disston until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of
33a the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion

of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder.

Third, Protective Clause: All the shares of principal and income hereby given shall be free from anticipation, assignment pledge or obligations of beneficiaries; and shall not be subject to any execution or attachment, so far as may be permissible in law.

Fourth, Trustees' Powers: The corporate trustee shall have the custody of all deeds for real estate, evidence of title, and all personal assets of the trust estate and shall when requested so to do consult with and advise the individual trustees. The proceeds of the sale of any and all real estate together with all income, including rentals from real estate which shall be collected by the individual trustees, shall be delivered by them to the corporate trustee, but the corporate trustee shall not be responsible therefor until actual receipt thereof. The corporate trustee shall upon the written request of a majority of the individual trustees and without further charge therefor assume such collections of income from real and personal estate as may be designated in said request. The corporate trustee shall render accounts of all receipts and disbursements at such intervals as may be specified by a majority of the then acting individual trustees. The corporate trustee shall not have the right to vote upon any matter connected with the administration of the trust estate, but all such matters, including the investment and reinvestment of principal, shall be determined by a majority vote of the individual trustees then acting; provided, however, that if after all of Settlor's children shall have come of age the number of individual trustees shall be reduced to less than three by reason of death, resignation or other cause, in such case and thereafter the corporate trustee shall have the right to vote upon matters connected with the administration of the trust estate, excepting only matters concerning the stock of Henry Disston & Sons, Inc., all of which matters shall at all times remain in the exclusive control of the indi-

dividual trustees, subject only to the right of the Settlor to direct the voting of said stock as hereinafter provided. The corporate trustee, during such period as it is not entitled to vote, shall be relieved of all liability or responsibility for the administration of the trust estate, excepting the proper handling of collections when entrusted to it and the safekeeping of funds and assets and the proper accounting therefor. Except in the case of borrowing money where the unanimous consent of the individual trustees shall be required, a majority of the individual trustees then acting as such shall have in addition to the powers vested in fiduciaries by law the following powers:

1. To retain the investments which Settlor has hereby assigned, transferred, and delivered to Trustees and any further investments which Settlor may hereafter assign, transfer, and deliver to Trustees for so long as they shall think best without liability for depreciation or loss; invest and reinvest without being confined to so-called legal securities, including the right to invest in preferred and common stocks of corporations, and to pay any money or take any action which they shall think best for the protection of any investments; provided, however, that except in the case of the sale of real estate by Trustees, not more than ten thousand dollars (\$10,000.00) shall be invested in any one mortgage and then only when the entire mortgage is acquired by such investment; and, provided further, that, except in the case of the sale of real estate by Trustees, no investment shall be made in any mortgage upon any church, club, theater, factory, hotel, or apartment house, it being Settlor's intention that such mortgage investment shall be limited in general to first mortgages on homes occupied by the owner or occupied by a tenant under a satisfactory lease.

2. To purchase and hold real estate, give options upon, amicably partition, mortgage, and lease the same with full power to enter into leases for any length of time which shall seem wise and without authority of any court.

3. To sell real and/or personal estate at public or private sale for such price or prices and upon such terms as may seem best and give good and sufficient deeds and bills of sale therefor, without any necessity on the part of the purchaser to see to the application of the purchase money and without authority of any court.

4. To purchase investments at a premium and charge the premium either against principal or income, or partly against principal and partly against income as may be deemed best, and the decision of the Trustees shall be binding and conclusive on all parties interested therein.

5. To exercise any option which may be given to the holders to subscribe to new stocks or bonds or other instruments in the nature

thereof and to join in any plan of reorganization, consolidation, or merger and to deposit securities thereunder as well as under the terms of any voting trust agreement; to vote in person or by proxy with respect to any stocks held by the Trustees, provided, however, that during the life of the Settlor, the Trustees shall be required to vote in such manner as Settlor shall direct with respect to all Stocks received from Settlor either at the creation of the trust or thereafter.

6. By unanimous action of the individual trustees and with the consent of the Settlor during his lifetime, to borrow such sum or sums from time to time as may seem necessary and advisable for the preservation or advantage of the trust estate with full power to pledge as collateral therefor such securities as may be necessary, without any liability on the persons making said loans to see to the application of the proceeds thereof. Settlor may, however, at any time by a writing addressed to the Trustees surrender or renounce this power of consent and thereafter shall possess no such power.

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education, and support of such beneficiary should he or she by reason of age, illness, or any other cause in the opinion of the Trustees be incapable of dispensing it.

37a Payment by the Trustees to the parent of any minor or to the person with whom such minor resides and the receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments.

8. To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as Trustees may consider to be for the best interests of such beneficiaries during illness or emergency of any kind; provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten percent (10%) of the value of such share of principal as appraised at the date of such expenditure, including in such appraisal sums of principal theretofore expended under this clause.

9. Any and all income, including dividends declared but not yet received, which was accrued on investments at the time of the delivery of the same at this time or hereafter by the Settlor to the Trustees shall be treated by the Trustees as income and shall be distributed to the beneficiary or beneficiaries accordingly.

10. During the lifetime of Settlor he shall have the power if he shall so desire to designate to the Trustees any securities in which the principal fund or any part thereof shall be invested, and the Trustees are hereby freed and discharged of any liability for any depreciation or loss that may occur in the investments so designated by Settlor. Settlor may, however, at any time by a

writing addressed to the Trustees surrender or renounce this power of designation and thereafter shall possess no such power.

Fifth. Right to Add to Trust: Settlor reserves the right by deed, will, or in any other manner, to add other real and personal property to this trust, all of which additions shall be held and applied as part of this trust.

Sixth. Irrevocability: This trust is hereby made expressly irrevocable.

38a **Seventh. Additional Trustees:** As William L. Disston, Rachel Elizabeth Disston, and Patricia Disston respectively come of age, they are hereby appointed as additional trustees with all the powers and authority granted to the original trustees in accordance with the terms of this deed of trust.

Eighth. Right to Appoint Substituted Trustees: It is hereby expressly agreed that the corporate trustee may be removed at any time by the action of a majority of the then acting individual trustees as evidenced by a writing signed by them and filed with the corporate trustee, provided, however, that the said individual trustees then acting shall at the same time by a writing signed by a majority of them and recorded in the Office of the Recorder of Deeds for Philadelphia County appoint as substituted corporate trustee another trust company of the City of Philadelphia, and such removal and substitution is hereby confirmed, and such substituted trustee shall have all of the powers heretofore granted to the original trustee. In the case of such removal, the persons having the power of said removal may if they so desire approve the accounting of the corporate trustee, and such approval shall be a full and complete acquittance and discharge of the corporate trustee with respect to its acts and transactions included in such accounting.

Ninth. Compensation of Trustees: The Compensation to be paid the corporate trustee shall be two per cent (2%) on principal, two per cent (2%) on income from personalty and three per cent (3%) on income from real estate. The compensation to be paid the individual trustees shall be two per cent (2%) on each of the three foregoing classifications, the said compensation to be divided among the then acting trustees in such manner as they or a majority of them may agree. The foregoing compensation to the corporate and individual trustees respectively shall be in full and complete payment for all services of every character rendered by the said trustees.

39a **Tenth. Acceptance of Trust:** This trust has been accepted by the Trustees in the State of Pennsylvania, and all questions pertaining to its validity, construction, and administration shall be governed and controlled by the laws of that State.

In witness whereof the Settlor and the Trustees have caused these presents to be duly executed the day and year first above written.

[SEAL]

(S) WILLIAM DUNLOP DISSTON,
LIBERTY TITLE AND TRUST
COMPANY,

By (S) J. N. FORT, Jr., *President*.

Witness:

(S) CHAS. A. DONNELLY,

Attest:

(S) J. W. FLEMING,
Secretary.

[SEAL]

(S) DOROTHEA D. JAMES,

[SEAL]

(S) DEBORAH DISSTON.

(S) WM. H. VOEHL.

40a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 17th day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared William D. Disston, the Settlor named in the foregoing instrument, who acknowledged the same to be his act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

(S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 17th day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared J. E. Fleming who, being duly sworn, did say that he is secretary of Liberty Title and Trust Company, the Corporate Trustee named in the foregoing deed of trust; that he is authorized as such to execute said instrument and that the seal affixed thereto is the corporate seal of said Liberty Title and Trust Company.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

(S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

41a STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

On this 23rd day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Dorothea D. James, who, being duly sworn, did say that she is one of the individual trustees named in the foregoing instrument and that she executed it and acknowledged it to be her act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

(S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

On this 23rd day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Deborah Disston, who, being duly sworn, did say that she is one of the individual trustees named in the foregoing instrument and that she executed it and acknowledged it to be her act and deed.

Witness by hand and notarial seal the day and year aforesaid.

[SEAL]

(S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

42a

SCHEDULE "A"

1,000 shares Henry Disston and Sons, Inc.

\$5,000 Par Value Stanley Crandall Company of Washington,
Twenty year First Mortgage 6% S. F. Gold Bonds due August
1, 1946.

Exhibit 2 to stipulation of facts

This Deed of Trust made this 9th day of December 1938 between William Dunlop Disston, of the City and County of Philadelphia and State of Pennsylvania, hereinafter called the Settlor, of the one part, and Dorothea D. James, Deborah D. Swartz, and William L. Disston, and such other additional trustees as may qualify in accordance with the terms hereof, hereinafter called the Trustees, of the other part, witnesseth that:

First. Creation of Trust: In consideration of One Dollar (\$1.00) paid by the Trustees to the Settlor at the execution hereof, the receipt of which is hereby acknowledged, and for the purpose

of settling the property herein mentioned upon the trusts herein declared, the Settlor hereby grants, assigns and sets over unto the Trustees and their successors All That Certain property more particularly described in Schedule "A" hereto attached and made a part hereof; together with all other property which may at any time be added to the principal of this trust, to be held by the Trustees upon the following trusts:

Second. Terms of the Trust: The Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest and reinvest the principal of said shares in accordance with the powers hereinafter granted, In Trust, Nevertheless, as follows:

1. As to one of said equal shares of principal, to pay over 43a to the Settlor's daughter, Dorthea D. James, in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally adopted by her or her descendants), and in such amounts as she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

2. As to the second of said equal shares of principal, to pay over to the Settlor's daughter, Deborah D. Swartz, in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death, whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally

adopted by her or her descendants) and in such amounts as
44a she shall by will appoint, or in default of such appointment,
to divide the same equally per stirpes among such of her
said descendants as are living at the time of such distribution, or
in default of such descendants then living, to divide the principal
equally per stirpes among such of the Settlor's other children and
their descendants (including children, if any, legally adopted by
any of them) as are then living; provided, however, that if said
daughter shall die before reaching the age of forty-five years, the
said power of appointment shall be subject to the right of the said
daughter to appoint to her husband during his lifetime or for any
shorter period the annual net income from not more than one-third
of her share of principal.

3. As to the third of said equal shares of principal, to pay over
to the Settlor's son, William L. Disston, in not less than quarterly
instalments the entire net income derived therefrom during his
lifetime; provided, however, that upon his reaching the age of
forty-five years one-half of the principal of his share shall be paid
over to him free and discharged of all trusts; and upon further
trust upon his death, whether before or after reaching the age of
forty-five years, to divide the principal of his share, or such por-
tion thereof as is then held by the Trustees, among such of his then
living descendants (including children, if any, legally adopted by
him or his descendants) and in such amounts as he shall by will
appoint, or in default of such appointment, to divide the same
equally per stirpes among such of his said descendants as are liv-
ing at the time of such distribution, or in default of such descend-
ants then living, to divide the principal equally per stirpes among
such of the Settlor's other children and their descendants (includ-
ing children, if any, legally adopted by any of them) as are then
living; provided, however, that if said son shall die before reach-
ing the age of forty-five years, the said power of appointment shall
be subject to the right of the said son to appoint to his wife

45a during her lifetime or for any shorter period the annual
net income from such part or all of his share of principal
as he may elect.

4. As to the fourth of said equal shares of principal, to accumu-
late the net income therefrom for the benefit of the Settlor's daugh-
ter, Rachel Elizabeth Disston, until she reaches the age of twenty-
one years, at which time to pay over to her all accumulated income
and thereafter to pay over to her in not less than quarterly in-
stalments the entire net income derived therefrom during her
lifetime, provided, however, that upon her reaching the age of
forty-five years one-third of the principal of her share shall be
paid over to her free and discharged of all trusts and upon further
trust upon her death, whether before or after reaching the age

of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally adopted by her or her descendants) and in such amounts as she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

5. As to the fifth of said equal shares of principal, to accumulate the net income therefrom for the benefit of the Settlor's daughter, Patricia Disston, until she reaches the age of twenty-one years,

at which time to pay over to her all accumulated income and
46a thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death, whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally adopted by her or her descendants) and in such amounts as she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

6. The Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective

minors, and shall accumulate for each minor, until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor, among others, irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the
 47a powers, duties and discretions including the power of investment and reinvestment, which are conferred upon them as Trustees hereunder.

Third. Protective Clause: All shares of principal and income hereby given shall be free from anticipation, assignment, pledge, or obligations of beneficiaries and shall not be subject to any execution or attachment, so far as may be permissible in law.

Fourth. Trustees' Powers: The Trustees, and the survivors and survivor of them and their successors, shall have, in addition to the powers vested in fiduciaries by law, the following powers:

1. To retain the investments and other property which the Settlor has hereby assigned, transferred, and delivered to the Trustees and any further investments and property which the Settlor may hereafter assign, transfer, and deliver to the Trustees for so long as they shall think best without liability for depreciation or loss; to invest and reinvest without being confined to so-called legal securities, including the right to invest in preferred and common stocks of corporations, and to pay any money or take any action which they shall think best for the protection of any investments; provided, however, that except in the case of the sale of real estate by the Trustees, not more than ten thousand dollars (\$10,000.00) shall be invested in any one mortgage and then only when the entire mortgage is acquired by such investment; and, provided further, that, except in the case of the sale of real estate by the Trustees, no investment shall be made in any mortgage upon any church, club, theater, factory, hotel, or apartment house, it being the Settlor's intention that such mortgage investment shall be limited in general to first mortgages on homes occupied by the owner or occupied by a tenant under a satisfactory lease.

2. To purchase and hold real estate; to lease any real estate which may at any time constitute part of the trust
 48a estate upon such terms and for such periods of time (even extending beyond the duration of the trusts hereunder) as the Trustees in their sole judgment may consider advisable; to construct, alter, repair, remodel, and reconstruct buildings and other improvements of every description on any such real estate; to lay out, open, and construct road improvements, as well as sidewalks and curbing, and dedicate the same to the public use; to construct, lay, and maintain water, gas, and power lines, and other similar facilities, and to consent to the use or dedication of any

such real estate for any such facilities; to employ such experts, engineers, agents, and employees as the Trustees may consider advisable to assist them in connection with the management, maintenance, development, improvement, subdivision, and sale of any such real estate; to pay for the services of any such experts, engineers, agents, and employees on a commission or such other basis as the Trustees in their sole judgment may consider advisable; to charge all expenses in connection with the management, maintenance, development, improvement, subdivision, and sale of any real estate held by the Trustees against either the income from or the principal of the trust estate, whichever the Trustees in their sole judgment may consider proper; to mortgage any such real estate; to impose restrictions upon any such real estate; to partition amicably any such real estate; to exchange and give options upon any such real estate; to sell at either public or private sale any such real estate for such prices and upon such terms and conditions as the Trustees in their sole judgment may consider proper, and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance thereof and all assignments, transfers, and other legal instruments which may be either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts and without any liability on the part of the purchasers to see to the application of the purchase money.

49a 3. To sell all personal property held at any time by the Trustees at public or private sale for such prices and upon such terms as may seem best and to give good and sufficient deeds and bills of sale therefor, without any necessity on the part of the purchaser to see to the application of the purchase money and without authority of any court.

4. To purchase investments at a premium and to charge the premium either against principal or income, or partly against principal and partly against income, as may be deemed best, and the decision of the Trustees shall be binding and conclusive on all parties interested therein.

5. To exercise any option which may be given to the holders to subscribe to new stocks or bonds or other instruments in the nature thereof; to join in any plan of reorganization, consolidation or merger and deposit securities thereunder as well as under the terms of any voting trust agreement; and to vote in person or by proxy with respect to any stocks held by the Trustees.

6. By unanimous action of the Trustees to borrow such sum or sums from time to time as may seem necessary and advisable for the preservation or advantage of the trust estate, with full power to pledge as collateral therefor such securities as may be necessary, without any liability on the persons making said loans to see to the application of the proceeds thereof.

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she, by reason of age, illness or any other cause, in the opinion of the Trustees, be incapable of dispensing it.

8. To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as the Trustees may consider to be for the best interests of such beneficiary during illness or emergency of any kind; 30a. provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten per cent (10%) of the value of such share of principal as appraised at the date of such expenditure, including in such appraisal sums of principal theretofore expended under this clause.

9. Any and all income, including dividends declared but not yet received, which has accrued on investments at the time of the delivery of the same at this time or hereafter by the Settlor to the Trustees, shall be treated by the Trustees as income and shall be distributed to the beneficiary or beneficiaries accordingly.

10. Each and every power and authority conferred upon the Trustees hereunder shall continue unabated and in full force after the termination, in whole or in part, of the trusts hereby created, or any thereof, until the whole of the trust estate shall have been distributed to and actually received by those ultimately entitled thereto, to the end that the Trustees shall have full power and authority either to convert the trust estate into money for distribution or to convert part into money for distribution and to distribute part in kind.

Fifth. Right to Add to Trust: The Settlor reserves the right by deed, will, or in any other manner to add other real and personal property to this trust, all of which additions shall be held and applied as part of the principal of this trust.

Sixth. Irrevocability: This trust is hereby made expressly irrevocable.

Seventh. Additional Trustees: As Rachel Elizabeth Diston and Patricia Diston respectively come of age, they are hereby appointed as additional Trustees. All additional and successor Trustees shall possess all the powers and authorities granted to the original Trustees in accordance with the terms of this deed of trust.

51a Eighth. Compensation of Trustees: The compensation to be paid the Trustees shall be two per cent (2%) on principal and two per cent (2%) on income from personalty and real estate, such compensation to be divided among the Trustees from time to time acting hereunder in such manner as they or a majority of them may agree. The foregoing compensation shall

be in full and complete payment for all services of every character rendered by the Trustees. However, the cost of the accounting work in connection with this trust shall not be covered by or payable out of such compensation, but the Trustees shall have the right to expend such sums from the principal of or income from the trust estate as may be necessary to employ an accountant to do such accounting work.

Ninth. All powers hereinbefore granted to the Trustees, with the exception of the power to borrow sums of money, may be exercised by a majority of the trustees and it shall not be necessary to have the unanimous consent of the Trustees except in the case of borrowing money as aforesaid.

Tenth. Acceptance of Trust: This Trust has been accepted by the Trustees in the State of Pennsylvania, and all questions pertaining to its validity, construction and administration shall be governed and controlled by the laws of that State.

In witness whereof The Settlor and the Trustees have caused these presents to be duly executed the day and year first above written.

(Sgd.)	WILLIAM DUNLOP DISSTON.	[SEAL]
(Sgd.)	DOROTHEA D. JAMES.	[SEAL]
(Sgd.)	DEBORAH D. SWARTZ.	[SEAL]
(Sgd.)	WILLIAM L. DISSTON.	[SEAL]

Witness:

W. LOGAN MACCOY.
ANNA M. DORNAN.

52a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared William Dunlop Disston, the Settlor named in the foregoing instrument, who acknowledged the same to be his act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Dorothea D. James, who, being duly sworn, did say that she is one of the individual trustees

named in the foregoing instrument and that she executed it and acknowledged it to her act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

53a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:)

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Deborah D. Swartz, who, being duly sworn, did say that she is one of the individual trustees named in the foregoing instrument and that she executed it and acknowledged it to be her act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:)

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared William L. Disston, who, being duly sworn, did say that he is one of the individual trustees named in the foregoing instrument and that he executed it and acknowledged it to be his act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL]

ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

54a

SCHEDULE "A"

1. All that certain message, plantation, and tract of land situate in the Township of Whitemarsh, County of Montgomery and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a stone in the Mathers Mill Road in the line of lands now or late of Daniel H. Mulvaney; thence partly along said road and partly by lands late of Thomas Danolt, deceased, South 49 degrees West 117 perches to a stone in the line of lands late of William Freas, deceased; thence by the said lands of William Freas and Charles Cox and land late of George Egbert, deceased, and since of John Wood, deceased, Southeastwardly 135

perches to a stone a corner of lands late of James Mitchell, now of Charles Cox; thence partly by said lands and partly by lands late of John Cox Northeastwardly 115 perches to a stone a corner of other lands late of John Cox now of Robert Maguire; thence by said land North 47 degrees West 126 perches to the place of beginning. Containing ninety-six acres of land, be the same more or less. Excepting and reserving therefrom and thereout the following:

All that certain lot or piece of ground with the buildings and improvements thereon erected, Situate in Whitemarsh Township, County of Montgomery and State of Pennsylvania, and described according to a plan or survey thereof made by Milton R. Yerkes, Civil Engineer, of Bryn Mawr, Pa., dated July 28, 1927, as follows, to wit: Beginning at a spike in the middle of Cold Point Road at the distance of 1,057.02 feet measured Southwestwardly along the middle line of Cold Point Road from an angle in said road, said angle being situate at the distance of 2,410 feet, more or less, measured in a Westerly direction from the middle of Stenton Avenue; thence extending from said point of beginning by other

land of William D. Disston, of which the land hereby conveyed is a part, South 45 degrees 21 minutes East 330 feet to a point; thence still by other land of the said William D. Disston South 44 degrees 39 minutes West 298 feet to a point; thence still by other land of the said William D. Disston North 45 degrees 21 minutes West 330 feet to a spike in the middle of the aforesaid Cold Point Road; thence extending along the middle line of the said Cold Point Road North 44 degrees 39 minutes East 298 feet to the place of beginning. Containing 2.258 acres, be the same more or less.

2. All That Certain triangular lot or piece of land Situate in the Township of Whitemarsh, in the County of Montgomery and State of Pennsylvania, bounded and described as follows, viz: Beginning at a point at the distance of 125 feet measured Northwardly from a point in and at right angles to the line established as the center line of the railroad of The Pennsylvania Railroad Company (Trenton Branch) said point in center line being distant 3,029.65 feet measured Eastwardly along said center line from a point therein over the center of Undergrade Bridge No. 17.93 which carries the said railroad over the Norristown and Flower-town Road; extending thence by land of the Manor Real Estate and Trust Company North 43 degrees 7 minutes East 305.67 feet to a stone; thence by land of William D. Disston South 44 degrees 50 minutes East 361.81 feet; thence by other land of the said Railroad Company on a line parallel with the said center line and 125 feet distant Northerly therefrom North 85 degrees

58 minutes West 465.85 feet to the place of beginning. Containing 1.272 acres, more or less.

56a

In the Tax Court of the United States

Supplemental stipulation of facts

(Docket Nos. 109985 and 110630)

Filed at hearing September 14, 1942

It is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys, that for the purposes of the above entitled proceedings the following statements of fact are true. Each of the parties hereto may object to any or all of the said facts as inadmissible and may introduce at the hearing in this matter any further facts not inconsistent with those stated herein.

1. Gross income of each of the trusts created under deed dated December 17, 1936, for the three minor beneficiaries, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston, for the years 1936, 1937, and 1938 was as follows:

WILLIAM L. DISSTON

1936	-----	\$300.00
1937	-----	815.42
1938	-----	69.00

RACHEL ELIZABETH DISSTON

1936	-----	\$300.00
1937	-----	815.42
1938	-----	69.50

PATRICIA DISSTON

1936	-----	\$300.00
1937	-----	815.41
1938	-----	69.50

2. From the said income of each of the said three trusts the trustees made the following payments during the years 1936, 1937, and 1938 for the said three minor beneficiaries:

57a

WILLIAM L. DISSTON (who became of age on April 12, 1938)

1936

Commission to trustees	-----	\$6.00
To Dorothea D. Disston, beneficiary's mother	-----	288.00

1937

Commission to trustees	-----	38.40
To Dorothea D. Disston, mother of beneficiary	-----	94.68
Safe deposit box rent	-----	4.40
Personal property tax	-----	3.92

1938

To William L. Disston, beneficiary	-----	300.17
Safe deposit box rent	-----	2.20
Personal property tax	-----	3.49

On May 4, 1937, a check in the amount of \$72.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on June 3, 1937.

On July 8, 1937, a check in the amount of \$216.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on July 12, 1937.

RACHEL ELIZABETH DISSTON

1936

Commission to trustees	\$6.00
To Dorothea D. Disston, mother of beneficiary	288.00

1937

Commission to trustees	38.40
To Dorothea D. Disston, mother of beneficiary	94.68
Safe deposit box rent	4.40
Personal property tax	3.92

1938

Safe deposit box rent	2.20
Personal property tax	3.49

58a. On May 4, 1937, a check in the amount of \$72.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on June 3, 1937.

On July 8, 1937, a check in the amount of \$216.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on July 12, 1937.

PATRICIA DISSTON

1936

Commission to trustees	\$6.00
To Dorothea D. Disston, mother of beneficiary	288.00

1937

Commission to trustees	38.40
To Dorothea D. Disston, mother of beneficiary	94.68
Safe deposit box rent	4.40
Personal property tax	3.92

1938

Safe deposit box rent	2.20
Personal property tax	3.49

On May 4, 1937, a check in the amount of \$72.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on June 3, 1937.

On July 8, 1937, a check in the amount of \$216.00 was drawn

and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on July 12, 1937.

3. Under date of June 2, 1937, Deborah Disston, one of the individual trustees under deed of trust dated December 17, 1936, wrote a letter to a Mr. Webb, an employee in the trust department of Liberty Title and Trust Company, corporate trustee thereunder, a copy of which is as follows:

59a

"JUNE 2, 1937.

"DEAR MR. WEBB: Would you please pay out any checks that have accumulated for Dorothea D. James and Deborah Disston from the Trust Fund of William D. Disston; and in the future, instead of holding the money to be paid quarterly please send out the checks as soon as you receive them. The money for the minor children, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston is to be accumulated and held for them until they become of age.

"Sincerely,

"DEBORAH DISSTON,
"Individual Trustee, Sec."

4. After 1937 the income of the trust for the minor beneficiary Rachel Elizabeth Disston was accumulated until she attained her majority.

5. After 1937 the income of the trust for the minor beneficiary Patricia Disston has been accumulated.

6. The corpus of the trust created by deed of trust dated December 9, 1936, consisted solely of entirely unimproved real estate. There has been no net income therefrom.

HAROLD EVANS,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

60a

In the Tax Court of the United States

Excerpt from transcript of hearing September 14, 1942

(Docket Nos. 109985-110630)

"MR. EVANS. * * * In addition to the facts covered by the stipulation, Mr. Brown is also willing to stipulate that the 1936 gift tax return of the Petitioner was filed on March 12, 1937.

"MR. BROWN. So agreed."

In the Tax Court of the United States

Memorandum opinion

(Docket Nos. 109985, 110630)

Rendered February 4, 1943

HILL, Judge. The Commissioner determined deficiencies in gift tax as follows:

Docket No.	Year	Amount
109985	1937	\$644.48
110630	1938	1,430.08

In determining the deficiencies respondent disallowed three \$5,000 exclusions for 1937 and two for 1938 upon the ground that the gifts made were of a future and not a present interest. He also adjusted the total net gifts in prior years by disallowing three \$5,000 exemptions for 1936.

The first issue is whether or not certain gifts in trust are gifts of future interests. If we so determine a second issue arises. This issue is whether or not the respondent can determine the deficiencies for the taxable years by readjusting the year 1936. The facts were all stipulated and as stipulated are adopted as our findings of fact. Only those deemed necessary to an understanding of the issues involved will be set forth herein.

Petitioner is an individual residing at 8840 Norwood Avenue, Philadelphia, Pa. The gift tax returns for the periods here involved were filed with the collector of internal revenue for the first district of Pennsylvania.

By deed dated December 17, 1936, petitioner transferred certain property in trust to Liberty Title and Trust Company, et al, trustees. The trusts were created for the benefit of his five children. The trust instrument provided in part:

Second. Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest, and reinvest the principal of said shares in accordance with the powers hereinafter granted, In Trust, Nevertheless, as follows:

4. As to the fourth of said equal shares of principal, to accumulate the net income therefrom for the benefit of Rachel Elizabeth Disston until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; * * *

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort, and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. * * *

Substantially the same provisions in regard to petitioner's son, William L. Disston, and his daughter, Patricia Disston, 62a were incorporated in the trust instrument, hereinafter surnames will be omitted. William L. was born April 12, 1917; Rachel Elizabeth, May 2, 1919; and Patricia, February 23, 1924.

Petitioner filed a gift tax return for 1936 on March 12, 1937. This return was audited by respondent and after making minor adjustments in petitioner's gift tax liability as reported in the return, respondent determined that during the year 1936 petitioner had made gifts aggregating \$71,952.49. These gifts included the above trust and one to his wife. Respondent allowed exemptions of \$5,000 for each of the six donees and an exemption of \$40,000. The net gifts were \$1,952.49 and petitioner paid the tax thereon.

On March 21, 1937, petitioner added to the trust 500 shares of capital stock of Henry Disston & Sons having a value of \$25,000. Shares having a value of \$5,000 were transferred to the trust for each of petitioner's five children.

By deed of trust dated December 9, 1938, petitioner conveyed to Dorothea D. James, and others, trustees, two tracts of land valued at \$38,581.54. This trust instrument provided for the creation of a trust for the benefit of each of petitioner's five children. The provisions as to Rachel Elizabeth and Patricia, minors, were substantially the same, if not identical, with those of the trust instrument of December 17, 1936.

The first issue which we must determine is whether or not the gifts in trust to the minors were of a present or future interest. Petitioner contends that those cases¹ which hold that gifts in trust are of a future interest where the trustees have discretion are not controlling here because the trustees had to distribute "such income therefrom as may be necessary for the education, comfort, and support of the respective minors." Someone must determine what, if anything, is necessary. The trustees are the logical 63a ones to so determine. We do not deem this clause any more compelling upon the trustees in this case than the discre-

¹ Commissioner v. Taylor, 122 Fed. (2d) 714; Welch v. Paine, 120 Fed. (2d) 141; Anne B. Smith, 45 B. T. A. 948 (on appeal, C. C. A. 8th).

tionary power vested in them in Lillian Seeligson Winterbotham, 46 B. T. A. 972. Moreover, the minors would not be entitled to any distribution until it became necessary for their education, comfort, or support. We would be unable to determine the value of such a right. See *Helvering v. Blair*, 121 Fed. (2d) 945. Since all of the interests created under both of the trust instruments were substantially similar, all must be held to be gifts of a future interest insofar as the minor beneficiaries are concerned. Thus, respondent's determination was not in error.

The second issue is whether or not respondent may now adjust for the purpose of determining net gifts in prior years the year 1936 which he admits is closed by the statute of limitations. However, he has not determined a deficiency for that year but is merely disallowing some \$5,000. exemptions which he erroneously allowed in the computation of the gift tax for 1936. Petitioner admits that we have previously considered this same issue and ruled against him: *Lillian Seeligson Winterbotham, supra*. He contends, however, that that holding was in error and that it should now be overruled. However, we are of the opinion that our holding therein was correct and we therefore follow that case. Thus, the deficiencies determined by respondent are correct.

Decisions will be entered under Rule 50.

64a

In the Tax Court of the United States

Decision

(Docket No. 109985)

Entered March 15, 1943

Pursuant to the memorandum opinion of the Court entered on February 4, 1943, the respondent herein on February 26, 1943 filed a recomputation of tax, and on March 12, 1943 the petitioner filed an agreement to such recomputation. Therefore, it is

Ordered and decided: That there is a deficiency in gift tax for the calendar year 1937 in the amount of \$644.48.

(S) SAM B. HILL, *Judge*.

In the Tax Court of the United States

Decision

(Docket No. 110630)

Entered March 15, 1943

Pursuant to the memorandum opinion of the Court entered on February 4, 1943, the respondent herein on February 26, 1943

filed a recomputation of tax, and on March 12, 1943 the petitioner filed an agreement to such recomputation. Therefore, it is

Ordered and decided: That there is a deficiency in gift tax for the calendar year 1938 in the amount of \$1,430.08.

(Signed) SAM B. HILL, Judge.

65a

In the Tax Court of the United States

Petition for review by the United States Circuit Court of Appeals for the Third Circuit-

Filed June 8, 1943

(Docket Nos. 109985 and 110630)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

I

JURISDICTION

William D. Dieston, your petitioner, by his attorney, Harold Evans, respectively petitions this Court to review the decisions of The Tax Court of the United States (formerly the United States Board of Tax Appeals) entered on March 15, 1943, and finding a deficiency in gift tax due from your petitioner for the calendar year 1937 in the amount of \$644.48 (Docket No. 109985) and for the calendar year 1938 in the amount of \$1,430.08 (Docket No. 110630).

Your petitioner at the time of filing this petition is a citizen of the United States and resides at 8840 Norwood Avenue, Philadelphia, Pennsylvania.

The returns of gift tax in respect of which the aforementioned tax liabilities arose were filed by your petitioner with the Collector of Internal Revenue for the First Collection District of Pennsylvania, located in the City of Philadelphia, State of Pennsylvania, which is located within the jurisdiction of the Circuit Court of Appeals for the Third Circuit.

Jurisdiction in this Court to review the decisions of The Tax Court of the United States, aforesaid, is founded on Section 1141 of the Internal Revenue Code.

66a

II

NATURE OF CONTROVERSY

By deed dated December 17, 1936, petitioner created five trusts, one for the benefit of each of his five children, three of whom were minors. The Commissioner of Internal Revenue in due course determined petitioner's gift tax liability for 1936 and allowed five exclusions (one on account of the trust for each child). In 1937 petitioner made additions to each trust. He duly filed a gift tax return for 1937 in which he claimed five exclusions. By deed dated December 9, 1938, petitioner created five trusts, one for the benefit of each of his five children, two of whom were then minors. Petitioner duly filed a gift tax return for 1938 in which he again claimed five exclusions.

The Commissioner of Internal Revenue did not question petitioner's right to deduct the exclusions claimed on his gift tax returns for 1936, 1937 and 1938 until the year 1941 when for the first time he contended that petitioner was not entitled to any exclusions on account of the gifts in trust for the benefit of petitioner's minor children, on the ground that the gifts in trust for such minors were gifts of future interests, and assessed deficiencies for the years 1937 and 1938 (the statute of limitations having barred any assessment for the year 1936). Petitioner contends that the gifts were gifts of present interests and that he is entitled to the exclusions claimed on his return.

Even if the gifts in trust were gifts of future interests petitioner contends that the Commissioner of Internal Revenue is without authority to recompute petitioner's net gifts for the year 1936 in order to increase the deficiencies for the years 1937 and 1938.

The Tax Court of the United States held:

- (1) That the gifts in trust were gifts of future interests in so far as the minor beneficiaries were concerned.
- (2) That the Commissioner of Internal Revenue could in 1941, for the purpose of increasing the deficiencies for 67a the years 1937 and 1938, adjust the exclusions for the year 1936, a year which was then closed by the Statute of Limitations.

III

ASSIGNMENT OF ERRORS

In making its decision as aforesaid, The Tax Court of the United States committed the following errors upon which your petitioner relies as the basis of this proceeding:

(1) The Court erred in finding that the gifts made to the trusts for minors in 1936 were gifts of future interests.

(2) The Court erred in finding that the gifts made to the trusts for minors in 1937 were gifts of future interests.

(3) The Court erred in finding that the gifts made to the trusts for minors in 1938 were gifts of future interests.

(4) The Court erred in not allowing an exclusion on account of the gift in trust to each minor child in 1936.

(5) The Court erred in not allowing an exclusion on account of the gift in trust to each minor child in 1937.

(6) The Court erred in not allowing an exclusion on account of the gift in trust to each minor child in 1938.

(7) The Court erred in holding that the Commissioner of Internal Revenue might recompute the amount of petitioner's net gifts in the year 1936, a year which it is admitted is closed by the Statute of Limitations, for the purpose of determining greater deficiencies for the years 1937 and 1938.

Wherefore your petitioner prays that this Court may review the decisions and orders of The Tax Court of the United States and reverse and set aside the same and direct the entry of decisions by said Court in favor of petitioner determining that there is no deficiency in gift taxes for the years 1937 and 1938, due 68a from petitioner; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

HAROLD EVANS,

Attorney for Petitioner,

1000 Provident Trust Building, Philadelphia, Pa.

[Duly sworn to by Harold Evans; jurat omitted in printing.]

69a

In the Tax Court of the United States

Notice of filing petition for review

Filed June 9, 1943

(Docket Nos. 109985 and 110630)

To J. P. WENCHEL, *Chief Counsel, Bureau of Internal Revenue.*

You are hereby notified that William D. Disston did, on the 8th day of June 1943, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of this Court heretofore rendered in the above-

entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 8th day of June 1943.

B. D. GAMBLE,

Clerk, The Tax Court of the United States.

Service of copy of petition for review acknowledged this 9th June 1943.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue,

Attorney for Respondent.

71 In the United States Court of Appeals for the Third
Circuit

No. 8440—October Term, 1943

WILLIAM D. DISSTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

And afterwards, to wit, 19th day of November 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Charles Alvin Jones, Circuit Judges, and the court not being fully advised in the premisses, takes further time for the consideration thereof.

Order directing reargument

Ordered that the above-entitled case be restored to the argument list and set down for reargument before the court en banc on Friday, February 25, 1944.

February 7, 1944.

By the Court.

JONES, *Circuit Judge.*

And afterwards, to wit, the 25th day of February 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable Charles Alvin Jones, Honorable Herbert F. Goodrich, and Honorable Gerald McLaughlin, Circuit Judges, and the court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 12th day of July 1944, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

72 In United States Circuit Court of Appeals for the Third Circuit.

No. 8440—October Term, 1943

WILLIAM D. DISSTON, PETITIONER

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to Review the Decision of the Tax Court of the United States

Before BIGGS, MARIS, JONES, GOODRICH, and McLAUGHLIN,
Circuit Judges

Opinion of the court

Filed July 12, 1944

By JONES, Circuit Judge.

The principal question here involved is whether gifts which the petitioner made to his minor children in the taxable years in question were gifts of future interests within the purview of Sect. 504 (b) of the Revenue Act of 1932¹ and, therefore, not entitled to the specific exclusion allowed by the statute. If that be answered in the affirmative, then a further question becomes pertinent. Was it proper for the Commissioner of Internal Revenue, in computing the petitioner's gift tax liability for the taxable years in question, to readjust and disallow exclusions theretofore allowed for gifts which the taxpayer had made to his minor children in a prior year as to which year the statute of limitations had run so far as the determination and assessment of a deficiency in tax for that year was concerned?

The facts are undisputed and show the following situation.

On December 17, 1936, the taxpayer created a trust for the benefit of each of his five children, three of whom were then minors. By the trust indenture, he appointed a trust company and his two adult children as trustees. He also made an outright gift

¹ For the purpose of computing the gift tax under the Revenue Act of 1932, c. 208, 45 Stat. 169, Sec. 504 (b), provides that—
“ . . . In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such persons shall not, for the purposes of subsection (a) [which defines “net gifts”], be included in the total amount of gifts made during such year.”

to his wife in that year. The taxpayer filed a gift tax return for the year 1936 which was duly audited and from which it was determined that he had made gifts in that year to his wife and his five children in an aggregate sum of \$71,952.49. The Commissioner allowed six exclusions of \$5,000 each (one on account of the gift to the wife and one on account of the gift to each of the five children) and an exemption of \$40,000. The taxpayer's net gifts for the year 1936 were accordingly determined to be \$1,952.49 upon which a tax was duly assessed and paid.

On March 21, 1937, the taxpayer augmented the corpus of the trust for his five children by adding thereto \$5,000 for each child (in the form of shares of stock in a company in which he was interested). At that time three of the children were still minors.

On December 9, 1938, the taxpayer created another trust for the benefit of his five children, the corpus whereof consisted of two tracts of unimproved land valued at \$38,581.54. At that time two of the taxpayer's children were still minors, one of the former minors having attained his majority on April 12, 1938. The trustees were the same corporate trustee and the three adult beneficiaries.

The Commissioner disallowed exclusions in the case of the taxpayer's gifts to his three minor children in 1937 on the ground that they constituted gifts of future interests within the intent of Sec. 504 (b). And, for like reason, he also disallowed exclusions on the gifts to the two minor children in 1938. In computing the taxpayer's net gifts in 1937 and 1938, subject to tax, the Commissioner also readjusted the taxpayer's gift tax return for 1936 by disallowing the exclusions therein allowed on account of the gifts to the minor children in that year, as to which the statute of limitations had run. The Tax Court sustained the Commissioner's determination and the present petition for review followed.

The 1936 and 1938 trust instruments do not differ materially so far as the interests given the minors and the powers conferred on the trustees are concerned. Only typical pertinent provisions need, therefore, be quoted.

As to the gift to a minor, paragraph Second, subparagraph 3, of the 1936 trust instrument provided:

"3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of

all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants (including children, if any, legally adopted by him or his descendants) in such amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of his said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said son shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said son to appoint to his wife during her lifetime or for any shorter period such portion of the annual net income from his share of principal as he may elect, not to exceed, however, one-half of such income."

The gifts to the other two minors (daughter) were in the same terms as the above except that each of the minor daughters was to receive one-third, instead of one-half, of the principal of her gift upon reaching the age of forty-five.

As to the trustees' powers with respect to the gifts to the minors, paragraph Second, subparagraph 6, provided as follows:

"6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort, and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties, and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder."

Paragraph Fourth, subparagraph 7, further directed the trustees—

"7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education, and support of such beneficiary should he or she by reason of age, illness, or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor or to the person with whom such minor resides and the receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments."

The gifts to the donor's adult-children were likewise subject to the trust but, as to such beneficiaries, there was no provision as to the accumulation of their shares in the income, the same being payable to them currently.

As the trust instruments disclose, the gifts to the minor children were immediate, definite, absolute, and irrevocable. In no respect did they depend upon the happening of an uncertain future event either for the determination of the donees or the quantum of the gifts. It seems plain, therefore, that the gifts did not constitute transfers of future interests.

In *United States v. Pelzer*, 312 U. S. 399, 403, the present Chief Justice, in construing Sec. 504 (b) of the Revenue Act of 1932, said that the phrase "future interests" was plainly not concerned with varying local definitions of property interests or local refinements of conveyancing and that the "purpose which marks the boundaries of the statutory command" was "the protection of the revenue and the appropriate administration of the tax immunity provided by the statute." Justice Stone then quoted from committee reports in support of the legislation (H. Rept. No. 708, 72d Cong., 1st Sess., p. 29; S. Rept. No. 665, 72d Cong., 1st Sess., p. 41) to the effect that—

"The term 'future interests in property' refers to any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date. The exemption being available only in so far as the donees are ascertainable, the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts."

Art. 11 of Treasury Regulations 79 (1936 ed.), interpreting Sec. 504 (b), declared that "future interests in property" should be taken to include "reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *." [Italics supplied.] In the *Pelzer* case the Supreme Court said (p. 404) that, as applied to the facts of that case, this regulation was within the competence of the Treasury to promulgate.

Applying the foregoing tests to the facts of the *Pelzer* case, the Supreme Court held the gifts there, which were limited to the settlor's minor grandchildren who should reach the age of twenty-one after a ten year accumulation period, were of "future interests." In short, the gifts in that case depended upon the happening of uncertain future events. Consequently, the Supreme Court said (p. 404), that "The gift thus involved the difficulties of

determining the 'number of eventual donees and the value of their respective gifts' which it was the purpose of the statute to avoid." Likewise, in *Ryerson v. United States*, 312 U. S. 405, where again the gifts were upon contingencies which might never happen, they were held to be gifts of future interests. By direct

76 contrast, the gifts to the minor in the instant case, which were immediate and absolute, when made, and did not depend upon the donees' survivorship or the happening of any uncertain future event, were gifts of present interests. The donor was, therefore, entitled to the specific exclusions allowed by the Act on his gifts to his minor children unless the provisions which he made as to the accumulation of the income during the donees' minority and the trustees' discretionary use thereof for the donees' benefit during their legal disability served to render the gifts "future interests." We do not think that they did.

The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard. The gifts were the property of the minor donees none the less, and so was the income which recurrently accrued thereon even though it was to be accumulated during the donees' minority. No one else had any interest in or to the gift or the income therefrom. Nor could any interest therein be acquired by anyone else except through the donees. If the donees should die during their minority, the gifts and all accumulated income would pass as part of their respective estates. The use and enjoyment of the gifts were the minors' from the day the gifts were made. The accumulated income inured alone to their benefit. Furthermore, for the purpose of determining the recipients of the gifts, the possession of the corpus was in the minor donees within the contemplation of the relevant provision of the Revenue Act. See *Helfering v. Hutchings*, 312 U. S. 393, 396, where the Supreme Court said that "the beneficiary of the trust to whose benefit the surrender [by the donor] inures . . . is the 'person' or 'individual' to whom the gift is made." In the test laid down by Art. 11 of Regulation 79 for determining a future interest, the terms, "use, possession, or enjoyment," are used disjunctively. A present possession of an absolute and irrevocable gift is not, therefore, to be submerged by a supposed lack of use or enjoyment which, in turn, rests upon no more than that the income is accumulated for the minor beneficiary during his minority rather than paid directly into his hands.

In the instant case the Commissioner concedes that the donor was entitled to specific exclusions on account of his gifts to his

adult children. Yet, those gifts were subject to the same trust as were the gifts to the minor children. The surrender of ownership by the donor of the subject matter of the gifts and the investiture of the donees therewith was just as certain and definite in the case of the minors as it was in the case of the adults. If, therefore, a distinction should be drawn between the gifts to the adult and to the minor children because the income from the gifts to the latter was to be accumulated during their legal disability, it would mean that a donor would never be entitled to an exclusion on an equally absolute and irrevocable gift to a minor. We can find nothing in the statute or in its evident purpose (*United States v. Pelzer, supra*) to warrant imputing to Congress an intent to penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently. See dissenting opinion of Judge Waller in *Fondern v. Commissioner*, — Fed. 2d —, — (C. C. A. 5), decided March 3, 1944.

Nor did the authority to the trustees to use, in their sole discretion, the income from the gifts to the minors for their support and education during minority make the income from the gifts any less the minors' property. The discretion was sole only in that it was for the trustees alone to exercise. But, that did not mean that the trustees might exercise the discretion arbitrarily or capriciously. The discretion was a legal one and, therefore, reviewable by a court of competent jurisdiction for an abuse of its exercise. The discretion thus reposed neither added to nor took away from the absoluteness of the gifts. The same may be said for the letter which one of the individual trustees wrote to the corporate trustee directing the latter to accumulate the income from the gifts to the minors. That letter evidenced no more than the individual trustee's exercise of her discretion and was wholly without effect so far as the minor beneficiaries' right to the income, even through accumulated, was concerned.

In our opinion an immediate and irrevocable gift to a minor in trust, not dependent for its consummation or continuation upon the happening of uncertain future events, constitutes a transfer of a present interest notwithstanding that the deed of gift provides for the accumulation of the income during the beneficiary's minority and authorizes the use thereof by the trustees, in their sole discretion, for the beneficiary's support and education during minority. *Commissioner v. Taylor*, 122 F. 2d 714 (C. C. A. 3) is, therefore, to be taken as overruled. It follows that the taxpayer in the instant case was entitled, on account of his gifts to his minor children, to the specific exclusions allowed by the Revenue Act. This conclusion makes it unnecessary for us to consider or pass upon the Commissioner's action in disallowing ex-

clusions on gifts made in a prior year when computing the taxpayer's net gifts in the years involved in the present proceeding. The decision of the Tax Court is reversed.

Dissenting opinion

Biggs, Circuit Judge, dissenting.

78 I dissent. It is clear that the gifts to five minor beneficiaries are, in part, at least, gifts of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932. The indentures provide that the income unexpended for the immediate benefit of the minors shall be accumulated for their future² enjoyment when they reach their respective majorities. If one of the cestuis should die before reaching the age of twenty-one years, the accumulation for his benefit could not pass to his administrator for the indentures create spendthrift trusts.³ If the accumulation passed to an administrator it would become liable to the deceased minor's debts and the purpose of the grantor in creating the spendthrift trusts would be destroyed. See Huber's Appeal, 80 Pa., 348, 359.⁴ Gifts of future interests were never clearer.

The Tax Court assimilates the facts of the case at bar to those of cases of discretionary trusts such as that discussed in Lillian Seeligson Winterbotham, 46 B. T. A. 972. The majority of this court take the view that the trustees are compelled to expend the income of the trusts for education, comfort, and support of the minors and that therefore the gifts are of present interests. Taking the position of the majority to its extreme logical limit and conceding that income to be used for the immediate benefit of the minor cestuis constitutes a gift of a present interest, we find a future interest and a present interest embraced in the trusts. As the Tax Court points out, the trustees are the judges (in the first instance)⁵ of how much of the income from the gift is to be expended for the immediate benefit of the minors. That amount might be much or little as justified by the circumstances of the particular minor involved and it is impossible to determine the value of the present right or even to allocate it to the first \$5000 in value of the gift. See *Helvering v. Blair*, 121 F. 2d 945, 947.

² See the definition of the term "future interests in property" contained in the committee reports recommending the legislation: H. Rept. No. 708, 72d Cong., 1st Sess., p. 29; S. Rept. No. 665, 72d Cong., 1st Sess., p. 41.

³ See the "Protective Clause," paragraph "Third" of both indentures. "The majority consider the accumulation provisions of the trusts as . . . but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard." In my opinion this consideration is not pertinent because a present interest by definition (see that contained in the House and Senate Reports cited in note 1 supra) must be limited to present enjoyment. The question before us under the statute is the nature of the gift . . . made to any person by the donor during the calendar year . . . that is to say, whether the gift embraced a future interest. We are not concerned in the case at bar with what the law of guardianship might do in another case. We are concerned with what the grantor did by the indentures sub judice.

It may be argued that since the right of a minor cestui to the use of the income for his education, comfort and support comes before accumulation and since the income from the first \$5,000 in value of the gift might not exceed the requirements of income for these purposes, the gift may be assumed to be one of present interest. Such an assumption, however, scarcely can stand as a basis for evaluating the gift of the present interest for the purpose of taxation.

It follows that I can perceive no sound reason why this court should overrule its decision in *Commissioner v. Taylor*, 122 F. 2d 714, cert. den. 314 U. S. 699.

As to the second point raised by the petitioner I think it is clear that the statute of limitations does not preclude the reduction of the \$40,000 specific exemption on account of gifts made in a previous barred year even though such gifts were not taxed in the earlier year. See *Greenlead Textile Corp. v. Commissioner*, 26 B. T. A. 727, aff'd per curiam 65 F. 2d 1017, and *Lord Forbes v. Commissioner*, 25 B. T. A. 154. See also *Treasury Regulations* 79 (1936 ed.), Article 5.

In my opinion the decision of the Tax Court should be affirmed.

In United States Circuit Court of Appeals

Judgment

This cause came on to be heard on the transcript of record from the Tax Court of the United States and was argued by counsel.

On consideration whereof, it is nowhere ordered, adjudged, and decreed by this court that the decision of the said Tax Court of the United States in this cause be, and the same is hereby reversed.

By the Court.

JONES, Circuit Judge.

JULY 12, 1944.

[Endorsements:] Order reversing decision of U. S. Tax Court received and filed July 12, 1944. Wm. P. Rowland, Clerk.

In United States Circuit Court of Appeals

Order amending opinion

And now, to wit, July 27, 1944, it is ordered and directed that the opinion filed for this court in the above-entitled matter on July 12, 1944, be amended by striking out the last full sentence at the bottom of page 8 of the printed opinion which reads as follows:

"The discretion thus reposed neither added to nor took away from the absoluteness of the gifts."
and by substituting therefor the following:

"The discretion thus reposed took nothing away from the absoluteness of the gifts."

By the Court.

JONES, *Circuit Judge*.

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UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, Third Judicial Circuit, ss:

I, Wm. P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Petitioner's brief, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of William D. Diston, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 8440, in file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 15th day of September in the year of our Lord one thousand nine hundred and forty-four and of the Independence of the United States the one hundred and sixty-ninth.

[SEAL]

WM. P. ROWLAND,

*Clerk, U. S. Circuit Court of Appeals,
Third Circuit.*

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Supreme Court of the United States

Order allowing certiorari

Filed February 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

